

## REMARKS

Claims 1-12 and 15-35 are pending in the application. Claims 4-8 and 23-26 are withdrawn from consideration by the Examiner. Claims 1-3, 9-12, 15-22 and 27-35 are rejected in this Office Action.

### Rejections Under 35 U.S.C. §103 (a)

The Examiner rejected claims 1-3, 9-12, 15-22 and 27-35 under 35 U.S.C. §103(a) as being unpatentable over Loginova et al. (US Patent 6,524,565) ("Loginova") in view of Patel et al (US Patent 6,342,209) ("Patil").

A proper obviousness analysis requires that the Examiner must establish a *prima facie* case of unpatentability based on obviousness. In doing so the Examiner should evaluate the totality of the facts and all the evidence to determine whether the claimed invention would have been obvious. MPEP § 2144.08 (II). Focusing the §103 inquiry on a particular aspect of the invention that differs from the prior art improperly disregards the "as a whole" statutory mandate. See *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d at 1383, 231 U.S.P.Q. at 93 ("Focusing on the obviousness of substitutions and differences instead of on the invention as a whole, as the district court did in frequently describing the claimed invention as the mere substitution of monoclonal for polyclonal antibodies in a sandwich assay, was a legally improper way to simplify the difficult determination of obviousness.").

The legal conclusion, that a claim is obvious within § 103(a), depends on at least four underlying factual issues: (1) the scope and content of the prior art; (2) differences between the prior art and the claims at issue; (3) the level of ordinary skill in the pertinent art; and (4) evaluation of any relevant secondary considerations. *Id.*, citing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966).

Loginova discloses use of a water-emulsifiable, film forming agent, a water-immiscible aliphatic hydrocarbon solvent, a non-ionic emulsifier and water.

The Examiner admits that Loginova fails to disclose the second film-forming polymer to be a silicone acrylic copolymer.

In column 4, lines 4 – 21, Loginova details the steps needed to obtain an emulsion. Loginova emphasizes the only way that a stable formulation having the claimed identified advantages, is by following the strictly defined sequence of steps and unusual temperature regime. (Column 4, lines 26 -29).

Applicants claim a cosmetic composition comprising a first film forming siloxane polymer, and a second film forming polymer consisting of a silicone acrylic copolymer, wherein said polymers are solvated or dispersed in a cosmetically acceptable nonpolar oil without a surfactant or water as part of the composition. The preparation of this composition are disclosed on pages 37 – 39 of the specification and it is not an emulsion. An emulsion is what the composition in Loginova is.

The Examiner has focused on select ingredients in Loginova not the emulsion in Loginova and in doing so has failed to compare with applicant's invention as a whole.

The Examiner turns to Patil for support of the obviousness argument pointing to the disclosure of one or more film forming polymer.

With respect to Patil, the Examiner indicated that applicants have failed to exclude the use of a surfactant in the instant claims. Applicants have amended the claims to rectify this omission. Support for this amendment is found in the examples without surfactant and on page 26, line 20 where surfactant is identified as an optional component of the composition. With the amendment of the claim the composition of Patil is not the same as applicant's claimed composition and therefore can not be used to support an obviousness argument.

For the reasons above the Examiner has failed to establish a *prima facie* case of obviousness and is respectfully requested to reconsider the rejection under 35 U.S.C. §103(a).

In view of the above amendments and remarks, Applicants respectfully submit that this application is now in condition for allowance and earnestly request such action.

If any points remain at issue which can best be resolved by way of a telephonic or personal interview, the Examiner is kindly requested to contact the undersigned attorney at the telephone number listed below.

Respectfully Submitted,



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